



No. 83-826

In the Supreme Court of the United States

OCTOBER TERM, 1983

HAMED & SALEM, INC., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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Petitioner argues that the court of appeals erred in not requiring the Secretary of Agriculture to reconsider the disqualification sanction he imposed upon it for violations of the Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703, 7 U.S.C. 2011 *et seq.*, in light of a provision of the Food Stamp Act of 1977, 7 U.S.C. (1976 ed. Supp. I) 2021, that was adopted after the violations in this case and that allows the Secretary to impose a civil penalty of up to \$5,000 in lieu of disqualification.

1. The Food Stamp Program, enacted as part of the Food Stamp Act of 1964, 7 U.S.C. 2011 *et seq.*, allows eligible households to purchase food stamps from the Department of Agriculture at a discount from the face value of the stamps. The stamps then can be used to purchase food items at retail grocery stores that are authorized by the Secretary of Agriculture to participate in the Program.

7 U.S.C. 2017. Participating grocery stores, however, are not allowed to exchange non-food items for food stamps or to give money as change for food stamp purchases. 7 C.F.R. 272.2(b) and (c) (1978). Violations of these regulations were punishable under the 1964 Act only by disqualification from the Program for reasonable periods of up to three years. The 1977 Act, however, permits the Secretary to impose a civil monetary penalty instead of disqualification, if he determines that the store's disqualification would cause hardship to food stamp recipients. 7 U.S.C. 2021.

Petitioner, a retail grocery store in Cleveland, Ohio, was authorized by the Secretary in 1977 to be a participant in the Program. After an investigation, petitioner was charged on November 27, 1978, with six violations of the regulations, all occurring in September 1978 (Pet. App. A2; Pet. Supp. App. 1-2). On March 12, 1980, after full administrative review, a Food Stamp Review Officer determined that petitioner had violated the regulations of the Food Stamp Program and that petitioner should be disqualified from participation in the Program for one year (Pet. 4).

2. Petitioner filed suit in the United States District Court for the Northern District of Ohio under 7 U.S.C. 2023, basically seeking review of the sanction imposed. After a trial de novo, the district court held that the violations had occurred and that the sanction was appropriate in light of the statute and regulations in effect in 1978, when the violations took place (Pet. Supp. App. 1-2, 4-5).

The court of appeals affirmed (Pet. App. 1a-3a). It held that the 1977 civil penalty provision did not apply to cases involving violations that occurred prior to January 1, 1979, the effective date of the regulations implementing the 1977 Act (Pet. App. 2a-3a).

3. Petitioner argues (Pet. 7-17) that the courts below erred in not requiring the Secretary to consider whether a

civil penalty would be a more appropriate sanction, because Congress expressed a preference for the monetary penalty under the 1977 Act. The court of appeals correctly held, however, that the 1977 statute plainly was intended to apply prospectively only. The new Act provides (7 U.S.C. 2011 note):

(a) The Secretary of Agriculture shall implement the Food Stamp Act of 1977 as expeditiously as possible consistent with the efficient and effective administration of the food stamp program. The provisions of the Food Stamp Act of 1964, as amended, which are relevant to current regulations of the Secretary governing the food stamp program, shall remain in effect until such regulations are revoked, superseded, amended, or modified by regulations issued pursuant to the Food Stamp Act of 1977. * * *

(b) Pending proceedings under the Food Stamp Act of 1964, as amended, shall not be abated by reason of any provision of the Food Stamp Act of 1977, but shall be disposed of pursuant to the applicable provisions of the Food Stamp Act of 1964, as amended, in effect prior to the effective date of the Food Stamp Act of 1977.

Congress thus expressed with unmistakable clarity its intention that all proceedings pending before the agency prior to the issuance of regulations pursuant to the 1977 Act should be disposed of under the Food Stamp Act of 1964. The instant case was pending at the agency level before the effective date of those amendments. The court of appeals therefore properly declined to allow petitioner the benefit of the new Act. This interpretation, which is of no prospective importance, is consistent with the decisions of other courts of appeals. See *Addison Savmor, Inc. v. United States*, 657

F.2d 80 (6th Cir. 1981), cert. denied, 454 U.S. 1144 (1982); *Kulkin v. Bergland*, 626 F.2d 181 (1st Cir. 1980).

Petitioner also contends (Pet. 10-12) that it suffered prejudice as a result of the Secretary's delay in promulgating the 1979 regulations. There is, however, no evidence in the record that the Secretary unduly delayed promulgation of the regulations in violation of the mandate of the Food Stamp Act of 1977 to implement the Act "as expeditiously as possible consistent with the efficient and effective administration of the food stamp program." 7 U.S.C. 2011 note. Furthermore, such an argument should provide no basis for evasion of the penalty properly imposed under the appropriate law. *Cass Corridor Food Coop v. United States*, 512 F. Supp. 925, 930 (E.D. Mich. 1981). See also *Antone v. Block*, 661 F.2d 230, 234 (D.C. Cir. 1981).¹

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

JANUARY 1984

¹While contending that the penalty should be remanded for reconsideration under the 1979 regulations, petitioner discusses (Pet. 15-17) differing standards for judicial review of penalties imposed for violations of the Food Stamp Act. Compare *Martin v. United States*, 459 F.2d 300 (6th Cir.), cert. denied, 409 U.S. 878 (1972), with *Cross v. United States*, 512 F.2d 1212 (4th Cir. 1975). This discussion is wholly irrelevant to the issue of the retroactivity of the 1977 Act.

Petitioner's suggestion (Pet. 12-14) that the finding of a violation of the requirements of the Food Stamp Program was improper is a purely factual issue that petitioner did not raise separately in the court of appeals. Therefore, it clearly does not warrant review by this Court.